MISC. CRIMINAL APPLICATION NO. 5770 OF 1994.

Date of decision: 22.3.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

Mr. S.R. Divetia, A.P.P. for appellant-State.
Mr. J.R. Dave, advocate for respondent.

1. Whether Reporters of Local Papers may be allowed to see the judgment? -Yes

2. To be referred to the Reporter or not? -Yes

3. Whether their Lordships wish to see the fair copy of judgment? -No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? -No

5. Whether it is to be circulated to the Civil Judge? -No

Coram: R. R. Jain, J.
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March 22, 1996.

Oral judgment:

Aggrieved by the order dated 21.9.1994 passed by the learned Additional City Sessions Judge, Court No.15, Ahmedabad, in Criminal Misc. Application No.1793 of 1994, enlarging the respondent on bail in a case registered against her vide C.R.No.6/94 under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act" for short), the State of Gujarat has preferred this application under Section 439 (2) of the Criminal Procedure Code for cancellation.

In order to appreciate rival contentions, it would be apposite to state briefly facts of the case:

Respondent, Sairabanu, wife of Iqbalbhai Safimohmad, is sharing common roof and bed of her husband at house No.A/8, Jantanagar Society, Ramol Road, Ahmedabad. On a secret information that said Iqbalbhai is dealing in contraband drugs, raid was carried. On search of person of Iqbalbhai Safimohmad, some contraband goods (43 packets) like brown sugar was found from the pocket of his shirt. The raiding party also decided to search the house including an Almirah (cupboard). Since the almirah was locked, the officer inquired about the key whereupon the present respondent, Sairabanu, handed over key and the cupboard was opened by Police Inspector Mr. Khant. From one of the drawers, the raiding party found one polyethylene bag containing 95 small packets like 43 others found from the person of Iqbalbhai Safimohmad. As the 95 packets contained substance like brown sugar, a case was registered vide C.R.6/94 under Sections 22 and 29 of the NDPS Act against the present respondent and in logical consequence she was arrested and sent in judicial custody. It is in this background that the respondent preferred the aforesaid Criminal Misc. Application under Section 439 of Cr.P.C. and the learned Addl. Sessions Judge by his impugned order, enlarged her on bail.

While passing this order, the learned Judge has observed that though the respondent was having the key of cupboard from which contraband goods are seized, she could not be deemed to be in conscious possession and, therefore, the prosecution shall be deemed to have failed to establish prima facie case against the respondent. In other words, while making this observation, the learned Judge appreciated the evidence on merits as to whether in a given set of facts and in the facts and circumstances the respondent can be legally said to be in possession of contraband articles/goods.

No doubt, it may be noted that ordinarily discretion exercised by subordinate court under Section 437 and 439 of Cr.P.C. for grant or refusal of bail should not be interferred except in a case where cogent and overwhelming circumstances are brought on record. The Supreme Court in the case of Dolat Ram v. State of Haryana, (1995) 1 SCC 349 has observed that the order of grant or refusal of should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the

trial. While making this observation, it has also been held that ordinarily the discretionary powers exercised by the trial court should not be interfered but in a case showing cogent and overwhelming circumstance, it would be in the interest of justice to interfere and cancel the order granting or refusing the bail. While referring to the practice and procedure generally adopted by the courts, it is also observed that at the stage when the bail applications are decided, the court should refrain from expressing any opinion on merits at that stage which is no more less than an initial/pretrial stage. In this case, the learned Judge has observed that though the key of the cupboard was given by respondent yet the respondent could not deemed to be in conscious possession of the contraband articles/goods found. This observation, in my opinion, is the only weighing circumstance for granting bail. Relevant observation made in paragraph 4 of the impugned order reads as under:

> "..... I think it would be too much to presume that she was in exclusive possession of that almirah and the things which were found from that almirah. We have also not to forget that as per the complaint also he had got definite information from his informant that Iqbalbhai Shafimohmad Memon was involved in selling prohibited articles and not only that, at present also he was busy in selling such articles. There was no information as the investigation papers indicate that alongwith Iqbalbhai his wife Sairabanu was also involved in selling such articles. It might be possible that in absence of Sairabanu or without her knowledge even during her presence in the house the accused Iqbalbhai might have kept those articles. It is also not so or it is not the case of the prosecution that Salim who was also found having some packets of brown sugar in his pocket had brought all those packets and the polyethylene bag containing loose brown sugar on that day and had handed over 95 bags and the polyethylene packet containing loose brown sugar and Sairabanu had taken possession of those articles and had kept those articles in the almirah at that time. Had it been so, then perhaps it would have been said that Sairabanu was in conscious possession of the contraband articles....."

By making this observation, the learned Judge has appreciated evidential value of Panchnama as well as other material collected by investigation. As a cardinal

rule, while deciding bail application, it shall be paramount duty of the court to consider prima facie case from the material available and placed before it and nonetheless to weigh its evidential value. If from the record prima facie case is made out then the court has to consider whether the ends of justice warrants exercise of discretion under Sections 437 and 439 of Cr.P.C. In my view, observations on merits were not at all warranted and by doing so the learned Judge has exercised discretion illegally.

While exercising jurisdiction, the learned Judge has also overlooked the provisions of Section 54 of the NDPS Act, which runs as under:

> "54. Presumption from possession of illicit articles:- In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under Chapter IV in respect of--
> (a) any narcotic drug or psychotropic substance;
> (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;
> (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance; or
> (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance, or any residue left of the materials from which any narcotic drug or psychotropic substance has been manufactured,
> for the possession of which he fails to account satisfactorily."

Thus, in light of Section 54 of NDPS Act it shall always be open to the court to raise presumption about legal possession against the person from whom such contraband goods are seized. However, such presumption is rebuttable and heavy burden would be cast to discharge the same. To rebut the presumption would be a matter of evidence and the parties concerned will have to lead evidence enabling the court in favour or against raising presumption and without affording opportunity to the parties, the court has no power to appreciate the evidence in this regard at the initial stage while considering bail application and came to conclusion about possession dehors the express provisions of Section 54 of

the NDPS Act. Mr. Divetia, learned A.P.P. has relied upon judgment of this Court in the case of Chetan v. Arvind Shivlal Soni, 1995 (2) GLH 686. He has also placed reliance on another judgment of this Court in the case of State v. Shaikh Lala Shaikh Balu, 1995 (2) GLR 1709. This Court has held that despite strong prima facie case if discretion is exercised, then it would be unreasonable, unjust, perverse and illegal exercise of discretion and deserves to be interfered by this court. In the instant case also when at the prima facie stage evidence is that the key of the almirah was given by the respondent and the almirah was opened with the same key and from one of the drawers 95 packets of contraband articles/goods were found is a strong prima facie case established by prosecution and yet is ignored by learned Judge.

At pre-trial stage, namely, deciding bail application, the court should not come into the technical questions, analysis the case and appreciate the evidence. What is required to be seen is only prima facie case and whether the prima facie is corroborated by the material placed on record, discretion should not be exercised.

In light of aforesaid observations, it becomes crystal clear that while deciding application for bail, the learned Judge has tried to analysis the case and appreciate evidential value of the panchnama placed before him and, therefore, on the face of it, the finding is unwarranted, perverse and illegal as a consequence thereof deserves to be set right by this court.

According to law, while deciding bail application, the learned Judge is not required to appreciate and analysis the evidence yet in this case an endeavour is made by the learned Judge to appreciate the evidence and has come to conclusion about conscious possession dehors the provisions of Section 54 of the NDPS Act. Thus, the finding being illegal and perverse by itself is a cogent and overwhelming circumstance apparent on the face of record.

In the result, the application is allowed. The impugned order dated 21.9.1994 passed by the learned Additional City Sessions Judge, Court No.15, Ahmedabad in Criminal Misc. Application No.1793 of 1994 granting bail to respondent is hereby set aside. The respondent is directed to surrender before the trial court on 2.4.1996, failing which the trial court shall be at liberty to take appropriate steps in accordance with law. Rule made absolute accordingly.

At this stage, learned advocate for the respondent, requests for stay of operation of this order to enable the respondent to approach the Supreme Court. Looking to the facts and circumstances of the case, operation of this order is stayed upto 3.5.1996.